Supreme Court, U.S.
FILED

962009 JUN 19 1997

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No.

In The

Supreme Court of the United States

October Term, 1996

MARK ROCANOVA,

Petitioner,

v.

UNITED STATES OF AMERICA AND
COMMISSIONER OF THE INTERNAL REVENUE
OF THE UNITED STATES OF AMERICA

On Petition For Writ of Certiorari To The United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED FOR REVIEW

This case presents two questions for review.

The *first question* presented by this case is as follows: where a statute imposes a penalty, and specifies that certain property will be subject to seizure to exact that penalty, does the *ex post facto* clause permit Congress to amend the statute retroactively, more than five years after the penalty has been imposed, to authorize the Government to seize other property to exact the same penalty?

The *second question* presented by this case was stated by the Eleventh Circuit Court of Appeals in an otherwise unrelated case in 1989:

> "The Supreme Court has not specifically addressed the issue of whether an amended limitations period that affects a right created by statute may be applied retroactively to existing causes of action." ***Sarfati v. Wood Holly Associates***, 874 F.2d 1523, 1527 (11th Cir. 1989).

Restated in the context of this case, the second question is as follows: where a statute (1) creates a liability, (2) imposes a penalty, and (3) limits the period in which the liability and penalty can be collected, can Congress amend the statute retroactively to extend the statute of limitations without violating:

1. the due process clause of the Fifth Amendment to the United States Constitution;
2. the equal protection clause; or
3. the *ex post facto* clause.

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BASIS FOR JURISDICTION IN THIS COURT

The order sought to be reviewed was entered on March 24, 1997. Review is sought in this Court pursuant to 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Please see reproduced constitutional provisions and statutes contained in the Appendix hereto.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This case began as an Adversary Proceeding in the United States Bankruptcy Court for the Southern District of New York. Jurisdiction in bankruptcy court was pursuant to the general provisions of Title 11, U.S.C. Reference as to the Adversary Proceeding was withdrawn on January 2, 1996, by order of a Judge of the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 157(d).

GROUNDS ON WHICH REVIEW IS SOUGHT

Review is sought pursuant to this Court's Rule 10(c), which states (in relevant part) that review may be granted where:

> [A] United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As will be show below, the United States Court of Appeals for the Second Circuit has decided an important question of federal constitutional law. Part of the Second Circuit's decision conflicts with this court's prior decisions, and part of that constitutional

question has not previously been addressed by this court, but should be. Part of that question was asked but not answered by the 11th Circuit Court of Appeals in 1989.

STATEMENT OF THE FACTS

From 1981 to 1985, petitioner Mark Rocanova ("petitioner"), was a member of a California partnership named Electra Services ("Electra"). In 1985, Electra stopped doing business. During its four-year existence, Electra regularly incurred liabilities pursuant to the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3301, the Federal Insurance Contribution Act ("FICA"), 26 U.S.C. § 3102(a), and the income tax withholding requirements of 26 U.S.C. § 3402(a)(1). All of these obligations were reported on the appropriate tax returns, which were timely filed. The taxes reported thereon were also timely paid over to the IRS; however, the government claims that some portions of liabilities incurred during the fourth quarter of 1983, the year 1984, and the first quarter of 1985, were not remitted.[1]

The liabilities in question were created by the statutory provisions set forth in the preceding paragraph, and at the time they were incurred, they were limited in scope and duration by 26 U.S.C. § 6502(a)(1), which provided in relevant part:

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun –
>
> (1) within 6 years after the assessment of the tax . . .

---

[1] The government submitted documents in the courts below which claim that Electra owed $69,520.93 in February, 1985, when it stopped doing business.)

On April 7, 1986, Electra filed a petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701, *et seq.*). A final discharge was granted on December 4, 1986, but no partnership tax liabilities, penalties or interest were dischargeable in that proceeding, due to certain provisions of the Bankruptcy Code not relevant here. Pursuant to 26 U.S.C. § 6503(h), the bankruptcy proceeding tolled the statute of limitations set forth above for the duration of the proceeding plus six months.

The government submitted documents in the courts below that claim, taking into account the tolling set forth in the preceding paragraph, that the last of the liabilities in question herein was due to expire on September 3, 1992.

THE RETROACTIVE EXTENSION TO SECTION 6502(a)

On October 18, 1990, Senators Joseph Lieberman and John Glenn introduced a bill to amend the Internal Revenue Code of 1986 to extend to 10 years the period of limitation on collection after assessment codified in 26 U.S.C. § 6502(a)). *See* 136 Congressional Record S1577-02 (October 18, 1990) at S15804-15805. The central feature of the bill was that it was to be made retroactive to cover all taxes and tax penalties assessed but unpaid as of its effective date, without regard to the age of the taxes or tax penalties, or the number of years encompassed by the retroactivity.

The bill was subsequently passed and was codified as § 11317(c) of Public Law 101-508 (1990). Subsection 11317(c)(2) causes the change in § 6502(a)(1) to be retroactive to:

> taxes assessed on or before such date [November 5, 1990] if the period specified in § 6502 of the Internal Revenue Code of 1986 (determined without regard to the amendments made by subsection (a)) for collection of such taxes has not expired as of such date.

THE GOVERNMENT'S SEIZURE OF PETITIONER'S PROPERTY

In October, 1993, more than a year after the last of the Electra's liabilities had expired under the original law, the Internal Revenue Service ("IRS") seized petitioner's bank account, claiming from him as a partner Electra's liabilities, plus penalties and additional interest accrued since the expiration of the original liabilities. Sixty-two percent (62%) of the government's claim consisted of tax penalties.

Petitioner was forced to file a petition in the United States Bankruptcy Court for the Southern District of New York. In December, 1993, petitioner filed an adversary proceeding challenging the constitutionality of the new law and the seizure of his property by the IRS in reliance thereon.

PROCEEDINGS IN THE COURTS BELOW

On September 5, 1995, at the request of United States Bankruptcy Judge Cornelius Blackshear, petitioner moved pursuant to 28 U.S.C. § 157(d) to withdraw the reference to the Bankruptcy Court; the motion was unopposed, and was "So Ordered" on January 2, 1996, by Judge Denny Chin in the United States District Court for the Southern District of New York.

Cross-motions for summary judgment were filed before Judge Chin in District Court. On May 29, 1996, Judge Chin denied petitioner's motion for summary and granted the government's motion, dismissing the complaint (A-4).[2] ***Rocanova v. United States***, 955 F.Supp. 27 (S.D.N.Y. 1996).

Petitioner subsequently appealed to the United States Court of Appeals for the Second Circuit. On March 24, 1997, the Court of Appeals affirmed without comment. ***Rocanova v. United States***, 109 F.3d 127 (2d Cir. 1997).

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[2] References preceded with the letter "A" refer to pages in the Appendix, submitted herewith.

DISCUSSION

The District Court focused solely on whether the new period of limitations imposes a new liability. This analysis ignores the language of the due process clause, which focuses on the seizure of property, not the imposition of liability.

The due process clause states in relevant part:

> No person shall . . . be deprived of . . . property, without due process of law.

(U.S. Const., Amend. V.)

At the time Electra's taxes and penalties were incurred in 1983-1985, the Internal Revenue Code provided that tax liabilities and tax penalties would expire after six years. (26 U.S.C. § 6502(a)). The effect of the limitations period was to limit, to the following items, the property that could be seized to satisfy tax liabilities and to exact tax penalties: all property in existence and property generated by or for the taxpayer for a period of six years after the taxes were incurred, plus tolling periods specified in 26 U.S.C. § 6503.

More than five years after the penalties were imposed in the case at bar, the property specified in the original statute proved to be insufficient to exact the full penalty, so Congress revised the statute retroactively to claim other property as subject to seizure, and thereby increased the scope of the penalty. Specifically, Congress amended the law to claim property acquired (including income earned) during an additional four years after the expiration of the original statute of limitations. This additional claim, made after the fact, violates (1) the due process clause, which prohibits the seizure of property without due process of law; and (2) the *ex post facto* clause, which prohibits the imposition of new or increased penalties after the fact.

EX POST FACTO CLAIM

The District Court rejected the *ex post facto* claim by stating that, "The Ex Post Facto Clause does not apply to civil tax legislation that does not impose punishment." However, this case involves civil tax legislation that does impose punishment. In ***United States v. Reorganized CF&I Fabricators of Utah, Inc.***, _____ U.S. _____, 116 S.Ct. 2106, 135 L.Ed. 506 (1996), this Court said that tax penalties are punishment. Justice Souter, writing for the majority, said:

> [A] tax is an enforced contribution to provide for the support of government; *a penalty . . . is an exaction imposed by statute as punishment* for an unlawful act. . . . *If the concept of a penalty means anything, it means punishment for an unlawful act or omission* and a punishment for an unlawful omission is what this exaction (excise tax) is.

_____ U.S. at _____, 116 S.Ct. at 2113, emphasis added.

Justice Souter went on to discuss "[t]he obviously penal character of these exactions [tax penalties]. . . ." (***Id.***)

In ***Landgraf v. USI Film Products***, 511 U.S. 244, 114 S.Ct. 1483 (1994), this Court said, "the Ex Post Facto clause flatly prohibits retroactive application of penal legislation." (511 U.S. at _____, 114 S.Ct. at 1497.)

Here, the statute imposing the tax penalty (the "punishment," in this Court's words) also specified the property which could be seized by the government to exact the penalty (i.e., property in existence or created by or for the taxpayer during a six-year period, plus certain precisely enumerated tolling periods), and the limitations period defined the *duration* of the penalty. The new law authorizes the seizure of other property to exact the penalty, and thereby expands the scope and duration of the punishment, retroactively.

The original law said in effect that the punishment consisted of the full penalty *or as much of the penalty as the taxpayer can*

generate over a period of six years, and then the penalty is over. The new law in effect says, "that wasn't enough punishment."

Moreover, the government claimed in the courts below that one intent of the retroactive legislation at issue here was to accrue additional interest on the tax penalties after the expiration of the original six-year period. Therefore, the government urges that part of the intent of Congress was to increase substantially the *actual amount* of the penalties through additional interest accruals, imposed retroactively.

If the decision of the courts below were to stand, Congress could expand the statute of limitations repeatedly. If the property generated by affected individuals during the expanded four year period should also prove to be insufficient to exact the full penalties, Congress could extend the statute of limitations many times to claim property generated in later years. The government could continue to accrue interest on penalties, and claim all property generated over the taxpayer's lifetime. An entire class of persons could be subjected to *punishment that never ends.*

A tax penalty hits some citizens with a punitive force much greater than others. The effect of the statute of limitations is to obligate the citizen to pay over the penalty, or as much of it as he can produce in the limitations period. When Congress changes the statute retroactively to extend the penalty for four more years, it extends the "sentence" retroactively; he must continue to turn over to the government the fruits of his labors for another four years. There is no action he can take or refrain from taking to avoid the *additional* punishment imposed by this new "sentence." It is imposed on him by fiat.

The courts below erred by holding that the statute at issue here does not impose punishment. This Court, by contrast, has very recently said that tax penalties are punishment and that they are penal in nature. (***CF&I Fabricators, supra.***)

This is a serious question of constitutional law which has not been but should be addressed by this Court.

THE DUE PROCESS CLAIM

The due process clause focuses on *property*. The government may argue that the statute of limitations does not specify property, it only affects the "time to collect" the property claimed. However, the time to collect is inseparable from the existence of property. The property available from a taxpayer over a particular period of time may be insufficient to satisfy a liability. For example, if a person with limited property incurred a tax liability and then suffered a serious disability or was the victim of an accident, he may earn no income and acquire no property during the entire limitations period. If, however, he were to recover, he might go on to earn income or acquire property after the original limitations period had expired. The new statute of limitations literally lays claim to this newly-acquired property through retroactive legislation.

The retroactive legislation says that when a statute claims property produced in a particular time period, which proves insufficient to satisfy a liability, the government may pass a new law claiming other property to satisfy the same liability *or exact the same penalty*. The courts below focused only on the original imposition of liabilities and penalties, and not on the property claimed by the same statutes that imposed the liabilities and the penalties; the due process clause focuses on the seizure of property.

Senators Lieberman and Glenn believed that every person affected by the retroactive legislation possessed property which should have been turned over to the government but was not. (*See* 136 Congressional Record S1577-02 (October 18, 1990) at S 15804-15805.) However, the law was not written to give the government additional time to collect property generated during the original limitations period. It was written to claim property generated during a period of four *more* years. This claim to new and additional property violates the due process clause, the focus of which is *property*.

RETROACTIVITY

The courts below judged this case strictly by the standards which have been applied in cases where retroactive legislation adjusted a tax law to give rise to a new tax liability.[3] This case differs from those cases, however, because this case involves a more specific question of retroactivity, which this Court should address, but has not: where a law (1) creates a liability, (2) imposes a penalty, and (3) designates certain property as subject to seizure to satisfy the liability and exact the penalty, can Congress amend the statute retroactively to seize other property if the original property proves insufficient?

This Court's cases on retroactivity are instructive in this context, but this case involves issues of even greater constitutional dimensions, because this case also involves the retroactive increase in a punishment imposed by statute.

In ***United States v. Carlton***, 512 U.S. 26, 129 L.Ed.2d 22, 114 S.Ct. 2018 (1994), this Court reaffirmed that retroactive legislation must be "neither illegitimate nor arbitrary" (114 S.Ct. at 2023, 129 L.Ed.2d at 29), and that the law must involve "only a *modest period* of retroactivity." (*Id.*, emphasis added.) This Court approved retroactivity in that case because, "Congress acted to correct what it reasonably viewed as a mistake" and because "Congress acted promptly and established only a modest period of retroactivity." (114 S.Ct. at 2023, 129 L.Ed.2d at 29-30, emphasis added.) In her concurring opinion, Justice O'Connor said, "A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." (114 S.Ct. at 2026, 129 L.Ed.2d at 33, emphasis added.)

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[3] See, e.g., ***United States v. Carlton***, 512 U.S. 26, 129 L.Ed.2d 22, 114 S.Ct. 2018 (1994); ***Pension Benefit Guaranty Corp. v. R.A. Gray & Co.***, 467 U.S. 717, 729, 81 L.Ed.2d 601, 611, 104 S.Ct. 2709, 2717-18 (1984); ***General Motors Corporation v. Romein***, 503 U.S. 181, 191, 117 L.Ed.2d 328, 330, 112 S.Ct. 1105, 1112 (1992); ***U.S. v. Hemme***, 476 U.S. 558, 90 L.Ed.2d 538, 106 S.Ct. 2071 (1986).

In the case at bar, by contrast, the courts below approved a very long period of retroactivity, reasoning that lengthy retroactivity was necessary to achieve the Congressional purpose of seizing as much property as possible.[4] If such a significant departure from the "modest period" and "prompt action" tests in ***Carlton*** is to be permitted, then this Court should say so; such an important question should not be left to a single decision by a District Court judge because it throws ***Carlton*** into disarray. As this Court recently noted:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . [f]or that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

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[4] Judge Chin said, "The very purpose of the Amendment required its application to all existing tax liabilities." (A-9.) Congress could have applied the legislation only to liabilities incurred within the year preceding the year of enactment, but in Judge Chin's view the purpose was to raise money, and so long retroactivity was justified by the need to seize as much money as possible. The courts below were mindful that this Court has held on many occasions that a statute of limitations on a liability created by statute cannot be extended after it has expired. ***Chase Securities Corp. v. Donaldson***, 325 U.S. 304, 312, note 8, 89 L.Ed. 1628, 65 S.Ct. 1137 (1945); ***William Danzer & Co. v. Gulf & Ship Island Railroad Company***, 268 U.S. 633, 69 L.Ed. 1126, 45 S.Ct. 612; ***The Harrisburg***, 119 U.S. 199, 214, 7 S.Ct. 140, 30 L.Ed. 358 ("the [statute of limitations] operates as a limitation of the liability itself as created, and not of the remedy alone"); ***Davis v. Mills***, 194 U.S. 451, 454, 24 S.Ct. 692, 48 L.Ed. 1067 ("the limitation goes to the right created and accompanies the obligation everywhere") (emphasis added); ***Whitfield v. City of Knoxville***, 756 F.2d 455, 461 (6th Cir. 1985) ("the limitation is a condition attached to the underlying substantive right and does not merely limit the remedy"); ***Sokolowski v. Flanzer***, 769 F.2d 975, 978 (4th Cir. 1985) (same). The decision below is the first time a court has decided that such a statute of limitations can be expanded indefinitely as long as it has *not yet* expired. In ***Sarfati v. Wood Holly Associates***, 874 F.2d 1523, 1527 (11th Cir. 1989), the 11th Circuit Court of Appeals noted that this Court has never directly addressed that question.

Landgraf v. USI Film Products, supra, 511 U.S. at ____, 114 S.Ct. at 1497 (quoting Justice Scalia's concurring opinion in ***Kaiser Aluminum Chemical Corp. v. Bonjomo***, 494 U.S. 827, 842-44, 855, 856, 110 S.Ct. 1570, 1579-81, 1586-87 (1990)).

If citizens cannot rely on ***Carlton*** and be confident that retroactive legislation will require prompt action and a modest period of that retroactivity, then this Court – not a District Court –should say so.

CONCLUSION

The decision of the courts below conflicts with this Court's decision in ***Carlton***. Those courts erred significantly in stating that this statute does not impose punishment, and thus that the *ex post facto* clause does not apply. The Eleventh Circuit Court of Appeals in 1989 noted that this Court has never directly addressed whether a statute of limitations on a liability created by statute can be expanded before the liability has expired.

Petitioner respectfully submits that the issues presented in this case are of compelling constitutional significance, and urges that the Court accept this case.

Respectfully submitted,

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Appendix to Petition for Writ of Certiorari

1. **United States Constitution, Amendment V:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **United States Constitution, Section 9[3] (the Ex Post Facto Clause):**

> No Bill of Attainder or ex post facto Law shall be passed.

3. **26 U.S.C. § 6502:**

Pre-November 5, 1990 Statute

§ 6502. Collection after assessment.

(a) Length of period. --Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes enforceable.

(b) Date when levy is considered made.--The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

See 26 U.S.C. § 6502 (1989)

Amended Statute effective November 5, 1990

§ 6502. Collection after assessment

(a) Length of Period.--Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--

(1) within 10 years after the assessment of the tax,

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 10-year period (or, if there is a release of levy under section 6343 after such 10-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes enforceable.

(b) Date when levy is considered made.--The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

See 26 U.S.C. § 6502 (1989 & Supp. 1993).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK ROCANOVA,

Plaintiff,

-against -

THE UNITED STATES OF AMERICA and COMMISSIONER OF THE INTERNAL REVENUE OF THE UNITED STATES OF AMERICA,

Defendants.

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CHIN, D.J.
MEMORANDUM DECISION 95 Civ. 8727 (DC)

In this action, plaintiff Mark Rocanova seeks a declaration that the retroactive application of § 11317(c) of Public Law 101-508, which revised § 6502 of the Internal Revenue Code by extending the statute of limitations for collection actions from six years to ten

years, is unconstitutional. Rocanova bases this argument on the Due Process Clause of the Fifth Amendment, the Equal Protection Clause, and the Ex Post Facto Clause. The parties have cross-moved for summary judgment. Because retroactive application of the ten-year statute of limitations is proper, the government's motion is granted and Rocanova's motion is denied.

BACKGROUND

From 1981 to 1985, Rocanova was a partner in a California partnership known as Electra Services ("Electra") During that time, Electra incurred certain tax liabilities pursuant to the Federal Unemployment Tax Act, 26 U.S.C. § 3301, the Federal Insurance contribution Act, 26 U.S.C § 3102(a), and income tax withholding requirements of 26 U.S.C. § 3402 (a) (1). The liabilities in question were assessed from December 26, 1983 until April 7, 1986.

On April 7, 1986, Electra filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Under the Internal Revenue Code, this filing tolled the statute of limitations on collection of the outstanding tax liabilities for the duration of the bankruptcy proceeding, plus six months See 26 U.S.C. § 6503(h). Since Electra's bankruptcy proceedings concluded on December 11, 1986, the collection period was tolled for fourteen months and four days. Thus, under the old six-year limitations period, the government would have been time-barred from collecting the December 26, 1983 tax assessment on March 2, 1991, that is, six years plus fourteen months and four days after December 26, 1983.[1]

Before the limitations period ran on any of Electra's outstanding tax liabilities, Congress amended the limitations period by enacting § 11317(c) of Public Law 101-508 (the "Amendment") .

[1] It is unclear from the record before me how the government arrived at November 30, 1990 as the date that the limitations period would have expired under the six-year statute of limitations. (See Gov't Br. at 8). In any event, whether the date is November 30, 1990 or March 2, 1991, the limitations period for Rocanova's earliest tax assessment would have expired after the extended statute of limitations took effect on November 5, 1990. Thus, the new limitations period applies to all of Rocanova's tax assessments at issue in this case.

Effective November 5, 1990, the Amendment changed the statute of limitations on collection actions from six years to ten years. This amended limitations period applied retroactively to all previously assessed tax liabilities -- if the six-year limitations period had not already expired. Under the amended limitations period, the government's time to collect the December 26, 1983 tax assessment would have expired on March 2, 1995.

In October 1993, before its time to collect under the Amendment expired, the IRS served a Notice of Levy on Rocanova's bank account to collect the unpaid tax assessments. In response, in December 1993 Rocanova commenced an adversary proceeding in the United States Bankruptcy Court, claiming that the limitations period had expired and that retroactive application of the amended limitations period was unconstitutional.

On September 5, 1995, at the request of United States Bankruptcy Judge Cornelius Blackshear, Rocanova moved pursuant to 28 U.S.C. § 157(d) to withdraw the reference to the United States Bankruptcy Court. The government did not oppose the motion, so on January 2, 1996, I so ordered a stipulation granting the motion to withdraw the reference. These cross-motions for summary judgment followed.

DISCUSSION

Rocanova argues that retroactive application[2] of the ten-year statute of limitations is unconstitutional under the Due Process Clause, the Equal Protection Clause, and the Ex Post Facto clause. I will address each of the grounds in turn.

I. Due Process Claim

When faced with due process challenges to retroactive tax legislation, the Supreme Court "repeatedly has

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[2] In its Reply Memorandum of Law, the government argues that the amended § 6502(a) is not a retroactive statute because it does not apply to collection periods that have already expired. The government is wrong; § 6502 is plainly a retroactive statute as the new limitations period applies to existing as well as future tax liabilities.

upheld" the legislation. United States v. Carlton, 114 S. Ct. 2018, 2021 (1994) (citing United States v Hemme 476 U.S. 558 (1986); United States v. Darusmont, 449 U.S. 292 (1981); Welch v Henry, 305 U.S. 134 (1938); United States v Hudson, 299 U.S. 498 (1937); Milliken v United States, 283 U.S. 15 (1931); Cooper v. United States, 280 U.S. 409 (1930)). The standard applied in determining the validity of retroactive tax legislation under the Due Process Clause is whether "'retroactive application is so harsh and oppressive as to transgress the constitutional limitation.'" Carlton, 114 5. Ct. at 2022 (quoting Welch, 305 U.S. at 147). Under the "harsh and oppressive" standard, retroactive tax legislation will be upheld if the government can show that "the retroactive application of the legislation is itself justified by a rational legislative purpose." Id. (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984))

Here, the government's stated intent in enacting the Amendment was to raise revenues without raising taxes or imposing a new tax and to reduce the government's potential losses from assessed, but unpaid, tax liabilities. The comments of Senator Lieberman and Senator Glenn, the Amendment's sponsors, on the Senate floor evidence this intent. Senator Lieberman noted that the Amendment could "raise as much as $600 million in the next 5 years, and it asks nothing more of law-abiding, taxpaying citizens of America." 136 Cong. Rec. S1577-02, S15805 (Oct. 18, 1990). The Senator continued that, faced with the need to raise taxes, few things could be more important than our ability to collect taxes that are admittedly owed to the Federal Government but are not being paid." Id. Senator Lieberman also noted that the Amendment was "fair" because "it would not apply to those assessments as to which the current statute of limitations has already expired." Id.

Senator Glenn stated that the government was unable to collect $600 million in 1983 and $2.1 billion in 1989 due to the expiration of the statute of limitations. Id. By extending the statute of limitations to ten years, the government could collect an additional $250 to $600 million over five years. Id. As these comments make clear, the purpose of the Amendment and its retroactive application was to raise revenue without imposing additional prospective tax liabilities. Such a purpose is rational and reasonable. See Carlton, 114 5. Ct. at 2023.

Other factors to be considered in assessing retroactive tax legislation include (1) whether the legislation abrogates vested rights, (2) whether the taxpayer relied on prior law so that, had he been able to foresee enactment of the legislation, he may have avoided the tax, and (3) whether the period of retroactivity is itself unduly harsh. Canisius College v. United States, 799 F.2d 18, 25-27 (2d Cir. 1986), cert. denied, 481 U.S. 1014 (1987).

Here, each of these factors favors the government. First, the extended limitations period does not abrogate any rights of the taxpayer. Rocanova did not have a "right" to avoid his tax liabilities after six years. Thus, by extending the statute of limitations to ten years, the government did not abrogate any of Rocanova's rights. Similarly, by merely extending the statute of limitations, Congress in no way created a new liability, imposed a new tax, or imposed any other new obligation on Rocanova whatsoever. The Amendment's only effect is that the government has more time to collect taxes that Rocanova admittedly owes but has not paid.

Second, Rocanova could not have relied on the prior limitations period to avoid the tax, for he admittedly owed the taxes that were assessed. If the new limitations period applied retroactively to revive expired claims, Rocanova could argue that its retroactive application upset his settled expectation of finality. The Amendment, however, only applied to still existing claims. Thus, the longer limitations period does not interfere with any of Rocanova's valid expectations.

Third, although the Amendment allows the government to collect taxes that were assessed as many as six years earlier,[3] that amount of time does not by itself give rise to a due process claim. Generally, retroactive tax legislation only applies to the previous tax year. Canisius College, 799 F.2d at 26.

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[3] In general, the Amendment does not apply to assessments that are more than six years old because it cannot revive expired claims. In some instances, however, such as this one, the Amendment will affect assessments that are more than six years old because the old statute of limitations had been tolled under some other statutory provision.

Nevertheless, "[t] here is nothing intrinsic in the 'harsh and oppressive' test . . . that requires a one-year bench mark as the constitutional limit of retroactivity." Id. at 26-27; see also Wiggins v Commissioner of Internal Revenue, 904 F.2d 311, 316 (5th Cir. 1990). Instead, tax legislation should be reviewed on a case-by-case basis, considering "'the nature of the tax and the circumstances in which it is laid.'" Canisius College, 799 F.2d at 27 (quoting Welch, 305 U.S. at 147).

Here, I find that there is nothing inappropriate about the length of retroactivity The very purpose of the Amendment required its application to all existing tax liabilities. Furthermore, Congress specifically avoided the harsh result of resurrecting limitations periods that had already expired. Given the statute's purpose and the nature of limitations periods in general, there was no way to avoid a period of retroactivity of several years. Under the circumstances, such retroactive application does not give rise to a due process claim.

II. Equal Protection Claim

Rocanova also argues that the retroactive application of the Amendment violates the Equal Protection Clause. The Equal Protection Clause guarantees that a state will not subject an individual to invidious discrimination. Harris v McRae. 448 U.S. 297, 322 (1980). To determine whether a state has acted in a discriminatory manner, the plaintiff must show that the state has acted to the disadvantage of some class of people. Maher v. Roe, 432 U.S. 464, 470 (1977) Generally, a statutory classification is valid if it is rationally related to a legitimate governmental purpose. Regan v Taxation With Representation, 461 U.S. 540, 547 (1983). Congress enjoys particularly broad latitude "in creating classifications and distinctions in tax statutes." Id.

Rocanova defines the class at issue as "a class of people who have existing tax assessments on November 5, 1990, regardless of the time in which those existing tax assessments were made, so long as the six-year statute of limitations had not yet passed on that date." (Plaintiff's Br. at 30). As discussed at length above, however, the classification purportedly created by retroactive application of the Amendment is rationally related to the legitimate

governmental purpose of raising revenue without imposing new or additional tax liabilities. Thus, retroactive application of the Amendment does not give rise to an equal protection claim.

III. Ex Post Facto Claim

Rocanova's final argument is that the retroactive tax legislation constitutes punishment and thus violates the Ex Post Facto Clause. The Ex Post Facto Clause does not apply to civil tax legislation that does not impose punishment. See United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977); Bankers' Trust Co v Blodgett, 260 U.S. 647, 652 (1923). In no way does extending the statute of limitations provided in § 6205(a), particularly where the Amendment did not apply to expired claims, constitute punishment.[4] Accordingly, the Ex Post Facto Clause simply is inapplicable to this case.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment in favor of the defendants dismissing the complaint with prejudice and without costs.

SO ORDERED.

Dated: New York, New York
May 29, 1996

DENNY CHIN
United States District Judge

[4] Notably, in an unpublished disposition, the Eighth Circuit rejected the very ex post facto argument that Rocanova raises here. Newgard v. United States, No. 91-3288, 1992 WL 74593, at 1 (8th Cir. Apr. 15, 1992).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1210-August Term, 1996

(Argued: March 18, 1997
Decided:March 24, 1997)

Docket No. *96-5079*

MARK ROCANOVA,

Plaintiff-Appellant,

-v.-

UNITED STATES OF AMERICA and
COMMISSIONER OF INTERNAL REVENUE,

Defendants -Appellees.

Before:

FEINBERG, CARDAMONE, and
WINTER, *Circuit Judges.*

Appeal from a grant of summary judgment for defendants in the United States District Court for the Southern District of New York (Denny Chin, *Judge)* in an action seeking a declaration that it is unconstitutional to extend a statute of limitations for collection actions that were not already time-barred. We affirm.

RICHARD M. KRAVER, Kraver & Levy, LLP, New York, New York, *for Plaintiff-Appellant.*

LINDA A. RIFFKIN, Assistant United States Attorney for the Southern District of New York, New York, New York (Mary

Jo White, United States Attorney,
Gideon A. Schor, Assistant United States
Attorney, of counsel), *for DefendantsAppellees*

PER CURIAM:

We affirm for substantially the reasons stated in the district court's opinion. *See Rocanova v. United States*, ____ F.Supp. ___, 1996 WL 284944 (S.D.N.Y. May 29, 1996).